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No. 90-1281

In The

Supreme Court of the United States

October Term, 1990

BARRY GLEICHER and BIOPHARMACEUTICS, INC., formerly PATIENT MEDICAL SYSTEMS CORP.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

PRELIMINARY STATEMENT

This Memorandum is submitted on behalf of Petitioners, Barry Gleicher and Biopharmaceutics, Inc., formerly Patient Medical Systems Corp. ("PMS"), in support of their Petition for a Writ of Certiorari and in reply to the Opposition Brief of

the United States ("Brief").

The Opposition Brief presents certain misstatements that underscore the gross deficiencies of the Prosecution. It asserts that Petitioners "understood that their claims should have been submitted for reimbursement to the New York Medicare carrier, Blue Cross and Blue Shield of Greater New York (N.Y. Blue Cross) . . ." (Brief, p. 5). In reality, however, when many of Petitioners' claims were transferred to N.Y. Blue Cross, that carrier refused to process or pay these claims on the grounds that they should have been submitted to different carriers. Accordingly, N.Y. Blue Cross itself did not "understand" what the Solicitor General now argues should have been obvious to Petitioners, *i.e.*, to which carrier claims should have been appropriately submitted.

Indeed, a conflict amongst the carriers themselves demonstrates that it was not possible or reasonable to expect that Petitioners had any clear understanding of where such claims "should have" been submitted. The carriers, such as the Ohio carrier, who were located geographically where the beneficiaries resided insisted that the point of sale for all claims was in New York where Petitioners had their central office, and directed that all claims should be submitted to N.Y. Blue Cross. N.Y. Blue Cross, however, insisted that the point of sale for these claims was in the geographic location where the beneficiaries resided, and that claims should be submitted to those carriers.[1]

The Opposition Brief further misleads when it suggests that

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1. This conflict further highlights another misstatement in the Opposition Brief. It wrongfully asserts that "all the carriers involved in this case applied the point of sale criterion in the same manner" (Brief, p. 10, fn. 6). The only similarity between the Ohio carrier and N.Y. Blue Cross' application of the point of sale criteria is that both refused to process the claims, and each asserted that the other carrier should process them.

there was only one New York Medicare carrier to whom Petitioners could have submitted claims, and that Petitioners chose to submit claims to carriers in other states to receive higher reimbursements. On the contrary, the Record reflects that there were three different carriers for New York State (Supplemental Appendix, 2sa-5sa)[2] and that one of them, the Queens carrier, actually paid a higher rate of reimbursement than the Ohio carrier to which claims for Queens beneficiaries had been submitted (65a). Furthermore, under the Code of Federal Regulations all Medicare carriers were expected to make the same payment for each claim, *e.g.*, the "customary" or "prevailing charge" for the "locality" where the beneficiary resided, regardless of where the Petitioner's office or the carrier itself was located. 42 C.F.R. § 405.502 (1989); 42 C.F.R. § 465.505 (1989). It is therefore inappropriate to suggest that Petitioners chose to submit claims to carriers that would offer higher rates of reimbursement.[3]

ARGUMENT

I.

This Petition challenges the convictions on the grounds that: The point of sale rules relied on by the Prosecution were never promulgated under the Administrative Procedure Act; the CM provisions (which are the only basis for creating these point of sale rules) do not apply to Petitioners, and the point of sale rules

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2. References to the Appendix shall be listed as ("__a"), and references to the Supplemental Appendix shall be listed as ("__sa").

3. As noted in the Petition, it is not improper to seek the highest reimbursement permissible. *See* Petition, p. 10, fn. 12 and cases cited therein. The issue in dispute is whether there was any requirement that Petitioners submit their claims to any particular carrier.

were unconstitutionally vague.[4]

Rather than respond to the merits of Petitioners' arguments regarding the validity of the point of sale rules, the Solicitor General now seeks to recharacterize the very basis of the conviction, and thereby alter the theory of the Prosecution. The Solicitor General no longer refers to point of sale rules, but instead recharacterizes them as "point-of-sale criterion" (Brief, p. 3), and attempts to dismiss Petitioners' arguments regarding the point of sale rules as "irrelevant . . . because petitioners were not convicted of 'violating' the Manual [CM]" (Brief, p. 10).

The Solicitor General's position is contradicted by the language of the Indictment[5], the Prosecution's opening statement[6], the thrust of the Prosecution's proof at trial[7], the Prosecution's

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4. The Petition additionally argues that the Public Protection Clause of the Paperwork Reduction Act, 44 U.S.C. § 3512, and the regulations thereunder, 5 C.F.R. § 1320.5(a), prohibits this prosecution, and that the Magistrate had no statutory jurisdiction to select a jury.

5. The Indictment charges that the CM *required* suppliers to file Medicare claims with carriers located at the "point of sale", and it *required* suppliers to identify on the claim form the address of the branch office actually supplying the service. The fraud charged was Petitioners' failure to comply with these CM requirements (38a-39a).

6. The Prosecution explained to the jury that the CM "gave the defendants billing instructions with respect to the Medicare claims and filing the claims," and "the defendants submitted these claims . . . to the Medicare carriers in New Jersey, Ohio and Illinois instead of New York where they were *required* to file them." (2sa).

7. At trial, the Prosecution's expert witness testified that the CM required suppliers to list the branch office "where the services were furnished" in box 31 of the claim (61a).

summation (71a) and the Prosecution's Appellate Brief[8]. At trial, the Prosecution continually argued that the CM created point of sale rules which *required* Petitioners to file their claims with a particular carrier, and further *required* Petitioners to list a particular branch office in box 31 of the claim form, *and* Petitioners' failure to comply with these point of sale rules constituted fraud and made their completion of box 31 on the claim form a literally false statement.

The Trial Judge also explained that the existence of the rules was an essential premise to a finding of wrongdoing:

> If there are no rules and regulations, there cannot be any fraud, it's that simple. I rule there was [sic] regulations . . .

(85a). Moreover, in the related civil case, initiated to challenge the validity of the CM point of sale rules, the Government squarely contradicted the position taken in the Opposition Brief herein. The Government sought to dismiss the civil suit on the ground of *res judicata* because the validity of these CM point of sale rules was already litigated in this criminal case.[9] The Government's Brief specifically argued:

> To convict plaintiff, the jury necessarily had to

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8. The Prosecution's Appellate Brief describes the CM and explains: "The suppliers *must* follow the billing instructions in the Manual." (96a). The Prosecution further observed that the CM required supplier to "place the address for the branch office covering the point of sale in box 31."(97a).

9. Although the Judge's statement was made in the related civil trial, it demonstrates his view of the criminal prosecution. The Trial Judge's position is further underscored by his comments at the conclusion of the criminal trial when he explained: "It was always my understanding that the civil action was dependent upon this outcome." (7sa).

> find that plaintiff had violated valid Medicare Part B regulations and instructions.

(10sa).

The Prosecutor, the Judge and the jury all understood that the fraud charged was based on Petitioners' violation of the CM point of sale rules. Because the Solicitor General is now unable to refute Petitioners' arguments regarding the rules' validity, he attempts to recharacterize the basis for the convictions denying the Prosecution's reliance on the CM. The "point of sale rules" are now referred to as "point of sale criterion" and the Solicitor General no longer argues that Petitioners were *required* to comply with these point of sale rules a/k/a criteria. Nevertheless, the Solicitor General still argues that the basis of the fraud and false statement convictions was Petitioners' failure to submit Medicare claims to the carriers to which such claims "should have" been submitted, and Petitioners' failure to list the branch office "expected" in box 31 of the claim form[10] (Brief, pp. 8-9).

The Government may not now change its theory of prosecution in order to justify a conviction that cannot be sustained on the theory presented at trial. *See Stirone v. United States*, 361 U.S. 212, 217 (1960) ("A court cannot permit a defendant to be tried on charges that are not made in the indictment against

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10. The crux of the Solicitor General's position regarding where the claims "should have" been submitted, what address was "expected" in box 31 and whether carriers relied on the address in box 31 to determine the point of sale, is subject to dispute in light of newly discovered exculpatory evidence which the Prosecution refused to produce and which was wrongfully withheld from Gleicher's Freedom of Information Act requests. This newly discovered information is the basis for writs of *Coram Nobis* and *Habeas Corpus*, which were filed on May 20, 1991, *Gleicher v. United States*, No. CV 91-1796 (E.D.N.Y.).

him.")[11]; *United States v. Smoler*, 557 F.2d 13, 17-19 (2d Cir. 1977) (The court reversed the conviction because after close of evidence, the Government changed its theory of prosecution from "outright fraud" to "breach of fiduciary duty").

Whether one relies on the theory of the prosecution at trial (that Petitioners were "required" to comply with the point of sale "rules") or the new theory presented by the Solicitor General at this time (that Petitioners "should have" and were "expected to" comply with the point of sale "criterion"), the criminal prosecution depends on the viability of the point of sale rules/criteria. It is undisputed that the claim form does *not* instruct suppliers to file claims with any particular carrier, and that it does *not* require that the supplier list any particular branch office in box 31 (all box 31 asks for is an address of the supplier) (56a). In submitting these claim forms, there was *no* fraud or false statements because the information given on the form was true

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11. *Stirone* reversed a conviction for unlawful interference with interstate commerce. The indictment identified a particular interference concerning the transportation of sand to Pennsylvania. At trial, however, evidence was also submitted regarding a different inteference with interstate commerce, which concerned the transportation of steel out of Pennsylvania. The *Stirone* Court reasoned that because they could not know whether the Grand Jury would have returned an indictment on the charge of interference with steel shipments out of Pennsylvania, or whether the actual verdict was based on this uncharged interference, it was possible that the defendant had been convicted on a charge that the Grand Jury never made. *Id.* at 218-19.

In this case, the indictment identified a particular fraud, *e.g.*, the failure to comply with the point of sale "rules" established in the CM. The Solicitor General's presentation of a new theory of fraud cannot now be used to justify the conviction because the Solicitor General's theory was not presented in the Indictment. This case is even more compelling than *Stirone* because the Solicitor General's new theory was not even presented by the Prosecution at trial.

and responsive to the request for information.[12] It has never been disputed that the equipment claimed for was actually delivered and appropriately requested by a physician.

The only way that Petitioners' conduct could be found to be criminal is to first assume the applicability of the point of sale rules/criteria and then further assume that Petitioners were *required* to comply with such rules. If these rules/criteria are to be given such force and effect, their promulgation must satisfy the mandates of the Administrative Procedure Act. Any other decision vitiates the very purpose of this Act.

II.

The argument that Petitioners were convicted for fraudulently providing false information rather than failing to provide information (Brief, p. 11) merely begs the issue. The Prosecution argued that the branch office actually supplying services was Petitioners' New York office and Petitioners presented false

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12. Box 31 of the claim form asks for an address of the supplier and Petitioners listed an address in this box. This box does *not* ask for the branch office located at the point of sale (56a). In fact, another box (box 24) asks for the "place of service", and it is undisputed that Petitioners correctly listed this information as the beneficiary's residence. How then could the information Petitioners presented on the claim form even be misleading? Accordingly, the controlling case must be *Bronston v. United States*, 409 U.S. 352, 362 (1973), in which this Court reversed a conviction because the information given was literally true.

The Government's reliance on *Dennis v. United States*, 384 U.S. 855 (1966) and *Kay v. United States*, 303 U.S. 1 (1938) is misplaced. In those cases, the statements made were objectively false, *i.e.*, could under no possible construction have been deemed as truthful. In *Dennis*, defendant members of the Communist Party had filed affidavits alleging that they were not members of the party. In *Kay*, defendant knowingly stated that the value of an objectively verifiable claim of $285 was $590.

information when they listed their Ohio or Illinois addresses rather than their New York address in box 31 of the claim form. Yet, as noted above, the claim form does not ask that any particular branch office address be listed in box 31; it merely asks that the supplier's address be listed in this box (56a).

The Prosecution, therefore, looked to the CM in an attempt to establish what address suppliers were required to list in box 31, arguing that its provisions clearly required that suppliers list in this box the branch office actually supplying the service (61a).[13] The CM, however, never received Office of Management and Budget approval as required by the Paperwork Reduction Act ("PRA"), and any requirements it allegedly imposed were unauthorized information collection requests. Nonetheless, the Prosecution relied on the CM, in effect rewriting the question asked on the claim form in order to charge that Petitioners' responses were false. Thus, Petitioners were convicted for failing to list a particular address that is not requested on the claim form.

The legislative history of the PRA and this Court's prior decisions demonstrate that unauthorized information collection requests may be *ignored* by the public. *See Dole v. United Steel Worker's of America,* 58 L.W. 4200, 4203 (February 2, 1990), *see also,* 5 C.F.R. § 1320.5(a). If such requests may be ignored, then the only authorized information requests made of Petitioners were on the claim form. It is fundamentally inconsistent to permit Petitioners to ignore unauthorized information collection requests, yet to charge Petitioners criminally because they allegedly responded inaccurately to unauthorized information collection requests. The legislative history of the PRA, in fact, indicates that protecting the public from being charged with fraud for failing

13. The Court of Appeals explained that "it was the manual [CM] that explained the proper address to be shown in box 31 . . ." (22a).

to fully comply with unauthorized government requests for information was one of the very reasons for enacting this legislation (*see* Petition, pp. 24-25, fn. 28).

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted and the Judgment of the Court of Appeals summarily reversed. Alternatively, the matter should be set down for a full briefing and oral argument. At the least, the Petition should be held, as the Solicitor General recommended, pending this Court's decision in *Peretz v. United States*, No. 90-615.

Dated: New York, New York
May 13, 1991

Respectfully submitted,

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APPENDIX J — ADDITIONAL EXCERPTS FROM RECORD ON APPEAL

[15] Opening Statement-Bevilacqua

It is charged that these defendants (indicating) knowingly, willfully, and unlawfully did combine, conspire and agree to violate the mail fraud statute and caused the use of the United States mails for the purpose of executing a scheme and artifice to defraud the United States Government by means of false and fraudulent pretenses and representations.

Now the purpose of the conspiracy was to obtain money by and through the fraudulent submission of Medicare claims to the United States and Medicaid claims to the State of New York.

To better understand this case it is helpful for you to know that the United States Department of Health and Human Services, that's an agency of the United States Government, they contract with private insurance companies to administer the Medicare programs in certain areas. These companies are referred to as "Medicare carriers."

It has been charged that all 4 defendants submitted Medicare claim forms to Medicare carriers in the states of New Jersey, Ohio and Illinois knowing that these Medicare claims should have been submitted to Medicare carriers in the State of New York.

Among the criteria used by Medicare carriers to determine which carriers should pay a claim is the location of the service or what you will come to know and was colloquially [16] referred to as the "point of sale."

* * *

Appendix J

[19] * * *

Now, in addition you are going to hear about a government publication called the Medicare Carriers Manual. This manual simply gave the defendants billing instructions with respect to the Medicare claims and filing the claims.

You will also learn that the defendants were knowledgeable about the manual's explanation, of the [20] jurisdiction of the claims and the concept of point of sale which determines where they are to be filed and which carrier.

Now, the defendants submitted these claims, you will learn, to the Medicare carriers in New Jersey, Ohio and Illinois instead of New York where they were required to file them for a very simple reason, as I said to you earlier, their motive was money, over $200,000 more on just these seat lift chair claims. So you will learn that that's the reason they filed the seat lift chair claims in New Jersey, Ohio and Illinois as opposed to New York, and the defendants obtained a great deal of money as a result of their fraudulent schemes and representations.

* * *

[982] MR. BEVILACQUA: The government calls Elizabeth Brady.

ELIZABETH BRADY, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. BEVILACQUA:

Appendix J

Q. Ms. Brady, by whom are you employed and what capacity? A. Employed by Empire Blue Cross/Blue Shield, I'm the manager in the security program department.

Q. Would you tell us, please, what your duties are in that department? A. The department is responsible for investigation of allegations of Medicare fraud. My office will investigate those allegations and where appropriate will refer them to the inspector general's office.

Q. Now, would you tell us, please, from January of 1983 through December 31 of 1986, did your carrier administer to the Medicare program a certain portion of the State of New York? A. Yes, that's correct.

Q. Tell the jury, please what counties, if any, your carrier covers? A. Empire Blue Cross/Blue Shield is the carrier for the lower 16 counties of New York State. We are not the carrier for Queens County, that is serviced by another insurance company.

* * *

[1007] * * *

FRANCES THOMPKINS,

having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. BEVILACQUA:

Appendix J

Q. Mr. Tompkins, by whom are you employed and in what capacity? A. GHI Medicare division, I'm a Program Evaluation Specialist.

Q. What are your duties? A. Primary duty has to be DME reimbursements and policies, also post-payment audits as well.

Q. In January 1983 to December 1986, was your insurance carrier the Medicare carrier for the County of Queens, State of New York? A. Yes, it was.

* * *

[1014] * * *

Next witness.

MR. BEVILACQUA: The government calls Mary McCarthy.

THE COURT: Maybe we should take a break. It's been an hour and 15 minutes.

MR. BEVILACQUA: Your Honor, the next witness will be 5 or ten minutes.

THE COURT: Is that your last witness?

[1015] McCarthy-direct/Bevilacqua

MR. BEVILACQUA: It's the third Medicare carrier for the State of New York.

MR. WERFEL: And the cross will be very brief also.

Appendix J

MR. BEVILACQUA: She's a short witness.

MARY McCARTHY, having been first duly sworn by the Clerk of the Court, was examined and testified as follows;

DIRECT EXAMINATION.

BY MR. BEVILACQUA:

Q. By whom are you employed and in what capacity? A. I'm the Assistant Vice-president of Professional Relations in Utilization Review for Blue Shield of Western New York, Upstate Medicare division.

Q. What are your duties? A. Oversee the professional review department and utilization review.

Q. From January 1, 1983, to December 31, 1986, was your insurance carrier the Medicare carrier for the upstate counties of New York State? A. That's correct.

Q. For the counties you've indicated? A. 45 counties, yes.

* * *

[1653] * * *

MR. LEMONEDES: PMS would also have the opportunity to make motions on the date of sentencing, and would there be a time scheduled for that?

THE COURT: No, because I wait for probation to advise me of the date of sentence. They send in their probation report

and that date is set for sentencing. It's about six weeks.

MR. LEMONEDES: May I respectfully ask for 60 days, at [1654] least?

THE COURT: For what?

MR. LEMONEDES: For the time of sentencing so I can prepare the motion that would be submitted at the same time.

THE COURT: It will take six weeks to have the sentence.

MR. LEMONEDES: I would ask for another two weeks after that to be able to look through the record and prepare the motion for Your Honor.

THE COURT: All right. Granted.

MR. KUNKEN: In the terms of reserving the motion.

THE COURT: Yes.

MR. LEMONEDES: In terms of the civil action, may I ask that we have a conference, on the discovery conference that date at the same time since everyone will be here.

We started the civil action a long time before this, Your Honor.

THE COURT: I know.

MR. BEVILACQUA: I would imagine that the government will move to dismiss the civil action. But Counsel for the United

States Attorney in the Civil Division, I will consult about that, Judge.

THE COURT: Okay. It was always my understanding that the civil action was dependant upon this outcome.

MR. BEVILACQUA: That's how I understood Your Honor's [1655] decision.

MR. LEMONEDES: That's not how I understood Your Honor's decision.

THE COURT: I think you should, though.

MR. LEMONEDES: All right.

* * *

(End of proceedings).

APPENDIX K — EXCERPTS FROM GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT OF A MOTION TO DISMISS THE CIVIL COMPLAINT IN *INTEGRATED GENERICS, INC. v. BOWEN*, NO. CV-872032 (E.D.N.Y.) (THE RELATED CIVIL ACTION)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action
No. CV-87-2032

(Wexler, J.)

INTEGRATED GENERICS, INC., formerly known as PATIENT MEDICAL SYSTEMS CORP.,

Plaintiff,

-against-

OTIS T. BOWEN, Secretary of Health and Human Services; FRED ROSEN, Director of Operations for Health Care Financing Administration, New York Regional Office; WILLIAM J. KEOGH, JR., Medical Operations Coordinator for Empire Blue Shield of New York; G. CALVIN SNEED, Special Agent, U.S. Department of Health and Human Services, Office of Inspector General,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS IN PART AND FOR SUMMARY JUDGMENT AS TO THE REMAINDER OF PLAINTIFF'S CLAIMS

Appendix K

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ARGUMENT

POINT I

SUMMARY JUDGMENT FOR DEFENDANTS SHOULD BE GRANTED AS TO PLAINTIFF'S ALLEGED CHALLENGES TO THE VALIDITY OF MEDICARE PART B REIMBURSEMENT REGULATIONS

At the outset of this case defendants moved to dismiss this case for lack of subject matter jurisdiction. That motion was denied. This Court ruled that the complaint broadly construed was a challenge to Medicare Part B regulations. Relying on *Bowen v. Michigan Academy of Family Physicians,* the Court stated

> Since plaintiff's complaint is framed as a challenge to the legality of the defendants' conformance with regulations, the Court finds that the complaint falls squarely within the bounds of *Bowen* and

> accordingly holds that subject matter jurisdiction exists over this lawsuit.

Integrated Generics, Inc. v. Bowen, 678 F. Supp. 1008.

This Court saw plaintiff's money claim as separable from the challenge to regulations. It observed, "it is speculative to state that plaintiff will be entitled to payment of the withheld funds if it prevails in the claims set forth in this litigation." *Id.* at 10.

Much has transpired since February 9, 1988, the date of this Court's decision. Plaintiff and some of its officers were convicted in this Court of conspiracy, fraud and making false statements or representations in connection with a scheme to submit Medicare Part B seat lift chair claims to states other than the state of the "point of sale" in order to benefit from higher reimbursement rates prevailing in those other states. A copy of the Indictment and the Verdict Sheet are annexed to the accompanying Cleary Affirmation.

To convict plaintiff the jury necessarily had to find that plaintiff had violated valid Medicare Part B regulations and instructions. Therefore, if this is a complaint solely challenging those instructions and regulations, summary judgment must be granted dismissing that complaint. Plaintiff, having had its day in court, is now precluded from religitating those issues here. *Enrich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951).

* * *